FOR ARGUMENT

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Supreme Court of the United States

October Term, 1979

No. 78-1604

CENTRAL MACHINERY COMPANY,

Appellant,

v.

STATE OF ARIZONA,
STATE TAX COMMISSION OF ARIZONA,

Appellee.

BRIEF OF THE APPELLEE

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CENTRAL MACHINERY COMPANY,
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Appellee.

BRIEF OF THE APPELLEE

INTRODUCTION

The Statement of the Case submitted by Central Machinery Company (hereinafter "CMC") correctly observes that the material facts are not in dispute and that the case was submitted upon a stipulation of facts. *See,* Record on Appeal, Second Agreed Statement of Facts, Item 15. However, after reciting a few of the material facts contained therein, CMC discusses a number of facts which are technically not a part of the record relating to the history of the Pima and Maricopa Indians and which facts bear little relevance to the proper resolution of the narrow legal question presented herein, *viz.,* is the Arizona transaction privilege tax applicable to CMC upon the facts of record?

It is the Appellee's position that the facts that (1) CMC is a non-Indian Arizona corporation doing business in Casa Grande, Arizona, (2) CMC had neither a federal Indian traders license nor itinerant peddlers permit and (3) the sale of the tractors in question was executed on a purchase

order that included not only the economic burden of the tax in question, but the economic burdens of various other of CMC's state taxes blended into the purchase price as undifferentiated cost components, (*see*, Record on Appeal, Second Agreed Statement of Facts, Item 15, pp. 15-15d), establish that the taxes were and are properly imposed upon the taxpayer, Central Machinery Company. In an attempt to address all of the points raised by CMC and the United States as amicus curiae in a unified fashion, the issues will be treated in this single brief.

SUMMARY OF ARGUMENT

Arizona does not tax "sales", as CMC and the United States apparently erroneously believe. The Arizona transaction privilege tax is imposed upon the separate and distinct activity of the exercise of the privilege of engaging in business. Thus, the rationale of *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965) is inapplicable in this case. Moreover, in view of the decision in *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973), it is the Appellee's further position that the conclusion in footnote 18 in the *Warren* case (*i.e.*, that the Buck Act, 4 U.S.C. §§ 105-110, does not apply to Indian reservations) should be reconsidered.

Finally, although neither CMC nor the United States as amicus curiae specifically urge the issue under *Williams v. Lee,* 358 U.S. 217 (1959), the state tax in question as imposed upon CMC does not infringe upon any right of self-government enjoyed by CMC's customer, the Gila River Farms. Furthermore, the argument of the United States that Article 1, Sec. 8, Clause 3 of the Constitution (the Commerce Clause) preempts the state tax of its own force is without merit.

For the foregoing reasons, the judgment of the Arizona Supreme Court should be affirmed.

I

THE APPELLANT AND AMICUS CURIAE MISPERCEIVE THE NATURE OF THE ARIZONA TRANSACTION PRIVILEGE TAX

It must be noted at the outset that both CMC and the United States as amicus curiae premise each argument of their respective briefs upon a fundamental mistake of law. That mistake is this: both the taxpayer and the United States erroneously assume and/or assert that the taxable event under the Arizona statutes in question (*i.e.*, Ariz. Rev. Stats. §§ 42-1309, 42-1312 and 42-1361: *see*, J.S., 1a-2a), is the "sale" transaction whereby title and possession of tangible personal property is transferred from a vendor to a vendee for a consideration. *See*, Ariz. Rev. Stats. § 42-1301.[1] The fact of the matter is that Arizona does not have a "sales" tax, that is, a tax which contemplates as the taxable event the actual act of title and/or possession transfer. On the contrary, from the very enactment of the Arizona transaction privilege tax in 1935 (*see*, Ariz. Laws 1935, Ch. 77), the Arizona transaction privilege tax has been imposed upon the exercise of the privilege of engaging in business. The Arizona Supreme Court has consistently held that *this* is the taxable event rather than the act of title and/or possession transfer. *See, Arizona State Tax Commission v. Garrett Corporation,* 79 Ariz. 389, 391, 291 P.2d 208, 209 (1955) and cases cited therein.

The determination by the Arizona Supreme Court that the taxable event under the transaction privilege tax is the exercise of the privilege of engaging in business as distinguished from the actual "sale" is not only consistent with the language of the statute imposing the tax (*see*, Ariz. Rev. Stat. § 42-1309; J.S., p. 1a), its decisions are consistent with

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[1] During the relevant time in question, Ariz. Rev. Stat. § 42-1301, in pertinent part, defined "sale" as:

"... any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration ...."

the statute's reasonable interpretation, given the Legislature's stated objective. Accordingly, these rulings constitute a definitive determination as to the meaning of the statute which renders the decision as to its nature binding and conclusive as a matter of law. *Gurley v. Rhoden,* 421. U.S. 200, 208 (1975); *American Oil Co. v. Neill,* 380 U.S. 451, 455-456 (1965); *Alabama v. King & Boozer,* 314 U.S. 1, 9-10 (1941).

Thus, the frequent references by both CMC and the United States to the "fact" that the sale of the tractors in question occurred within an Indian reservation and/or that the sale is the "tax event" (*see e.g.,* Appellant's Brief, pp. 14-15) are plainly erroneous. The taxable activity herein is the exercise of the privilege of engaging in business within the State of Arizona beyond the boundaries of any Indian reservation at all. It is an admitted fact that Central Machinery Company maintains no place of business upon any Indian reservation within Arizona and is in fact a non-Indian Arizona corporation doing business in Casa Grande, Arizona. (J.S., p. 3; Appellant's Brief, p. 2). The fact that one of its sale transactions may have transpired in a particular portion of Arizona (*i.e.,* within the boundaries of the Gila River Indian Reservation) cannot alter the fact that the gross receipts received from that title/possession transfer constitute nothing more than the *measure* of the separate taxable activity, *viz.,* engaging in business within the State of Arizona. *Arizona State Tax Commission v. Garrett Corporation, supra; Arizona State Tax Commission v. Southwest Kenworth, Inc.,* 114 Ariz. 433, 561 P.2d 757 (Ct. App. 1977), *cert. denied* 434 U.S. 834 (1977).

Accordingly, as a result of this manifest threshold error on the part of both CMC and the United States as amicus curiae, this dispute is technically at an end and the decision of the Arizona Supreme Court should be affirmed. Under Arizona law, the proper measure of the taxable activity of engaging in business within Arizona includes the gross receipts received from sale transactions occurring within the State of Arizona. Clearly, the Gila River Indian Reservation exists wholly within the exterior boundaries of Arizona. *Cf. Surplus Trading Co. v. Cook,* 281 U.S. 647, 650-651 (1930).

Indeed, even if one were to assume that the Gila River Indian Reservation were, for example, not a part of Arizona,[2] the fact that the transfer of title and/or possession to the tractors purportedly transpired beyond the jurisdictional reach of the State of Arizona does nothing to alter the fact that the taxable activity *did* occur beyond the limits of any Indian reservation and was properly within the jurisdiction of the State of Arizona to tax.

In this regard, CMC contends (Appellant's Brief, p. 15) that it is the State's position that its tax is a "privilege" tax rather than a "sales" tax, and that:

> "This purported distinction was rejected by the Court in [*Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965)]. Its only legal relevance is to attempt to designate that the party liable for the tax is the seller alone rather than the buyer or both of them." (Footnote omitted)[3]

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[2] *See,* for example, Appellant's Brief, p. 15, where the statement is made: "Nor does Arizona attempt to tax resident sellers based on sales transacted in other states or nations." Arizona does not tax "sales", whether they occur in this State, another state, another nation or another continent. Arizona does, however, properly tax businesses with a sufficient nexus to the State of Arizona for the privilege of engaging in business within this State and properly requires the inclusion in the measure of that activity the gross receipts and/or the gross income which may be received from title and/or possession transfers transpiring beyond the geographic boundaries of Arizona. *See, Norton Company v. Department of Revenue of State of Illinois,* 340 U.S. 534 (1951); *Arizona State Tax Commission v. Southwest Kenworth, Inc.,* 114 Ariz. 433, 561 P.2d 757 (Ct.App. 1977), *cert. denied* 434 U.S. 834 (1977).

[3] In support of this position, CMC cites *First Agricultural National Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339, 347 (1968).

By this statement, CMC displays the second fundamental error burdening its position: the Arizona Supreme Court has not only ruled with respect to the distinction between the "legal incidence" and the "economic incidence" of the Arizona transaction privilege tax, it has also specifically passed upon the *nature* of the tax. That is to say, the highest court of the State of Arizona has determined two things, *viz.*, (1) that the legal incidence of the tax is upon the vendor or businessman alone *and* (2) that the nature of the tax is that of a business privilege excise tax rather than a true sales (*i.e.*, title/possession transfer) tax. *Arizona State Tax Commission v. Garrett Corporation, supra.*

To contend that the ". . . only legal relevance . . ." of such a distinction is to decide the question of where the legal incidence of the tax falls is an incomplete and therefore inaccurate analysis of the Arizona law. Even under this Court's decision in *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965), if the taxable activity — as distinguished from the *measure* of said activity — takes place beyond the boundaries of an Indian reservation, non-discriminatory state laws, including tax laws, apply to persons who may otherwise have dealings with Indians. *See, Taylor v. United States,* 44 F.2d 531 (9th Cir. 1930), *cert. denied,* 283 U.S. 820 (1931); 57 I.D. (Decisions of the Department of Interior) 124, 125, both cited with approval in *Warren,* 380 U.S. at 690, n. 14. This rule applies even in situations where the direct legal incidence of the state tax is imposed upon an Indian or Indian tribe. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973); 57 I.D. 124, 125; 58 I.D. 562, 563-567.

Accordingly, under this Court's decisions in the *Gurley, Boozer* and *Neill* cases, *supra,* the Arizona Supreme Court's prior determinations as to both the legal incidence of the

tax and the nature of the tax should be declared conclusively binding insofar as the present dispute is concerned, thereby necessitating the affirmation of the lower court decision.

II

THE DECISION IN THE WARREN CASE IS NOT CONTROLLING

Both CMC and the United States as amicus curiae contend in their respective briefs that this Court's decision in *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965) controls the outcome of this case.[4] It is the State's position that, in view of the fact that the taxable event in the present dispute transpired beyond the boundaries of any Indian reservation, the decision in the *Warren* case is distinguishable and therefore inapplicable.

In *Warren,* this Court held that the Arizona transaction privilege tax could not be applied to the exercise of the privilege of engaging in business by a non-Indian federally licensed Indian trader located upon the Navajo Indian Reservation with respect to his business activities involving reservation Indians. In reaching that conclusion, this Court was presented with two alternate bases for decision by the taxpayer. In terms of the question presented to this Court in the jurisdictional statement filed by the Warren Trading

[4] An additional contention is advanced for the first time on appeal (and not by the taxpayer, but by the United States as amicus curiae), that Art. 1, Sec. 8, Clause 3 of the U.S. Constitution (the Commerce Clause) in and of itself results in constitutional preemption even without regard to the federal regulatory scheme discussed in the *Warren* decision. Assuming, *arguendo,* that this brand new issue is properly before this Court, it being advanced by an amicus curiae rather than Central Machinery Company, the fact of the matter is that the discussion by the United States (United States Amicus Curiae Brief, pp. 9-16) is not only in error, it actually supplies additional support for the conclusion that the present tax was properly applied to Central Machinery Company. This aspect of the amicus curiae brief will be discussed in Argument IV, *infra.*

Post Company,[5] the primary concern was whether or not the Arizona statutes in question were repugnant to and in violation of Article 1, Sec. 8, Clause 3, the Commerce Clause. As an alternate ground, the taxpayer urged that the federal Indian traders statutes and implementing regulations preempted Arizona's tax.

It is important to note that this articulates two distinct concerns, the primary one embraced by Article 1, Sec. 8, Clause 3, the Commerce Clause, and only secondarily a concern embraced by Article 6, Sec. 2, the Supremacy Clause. In its decision, this Court specifically reserved a ruling on the Commerce Clause basis and instead decided the case on the secondary issue, that is, the preemption issue. This Court specifically found it unnecessary to consider whether the tax was prohibited by the Commerce Clause in view of the fact that, in its view, the state statutes were preempted by the federal regulatory scheme. *See*, 380 U.S. at 686.

After examining the various federal statutes and regulations applicable to the licensed Indian trader located on the Navajo Reservation doing business with reservation Indians,[6] this Court held, 380 U.S. at 690, that the regulations and statutes authorizing them seemed sufficient to demonstrate that

> "... Congress has taken the *business* of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.[14]" (Emphasis added)

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[5] *See*, Jurisdictional Statement, *Warren Trading Post Company v. Arizona State Tax Commission*, USSC Doc. No. 115, October Term, 1964, p. 6.

[6] Interestingly, the Warren Trading Post Company did not challenge the State's right to impose the transaction privilege tax directly upon it with respect to its business activities on the reservation with non-Indians. *See*, 380 U.S. at 686, n.1.

Footnote 14 in the foregoing quote specifically cited *Taylor v. United States, supra*, and 57 I.D. 124, 125. That Interior Department opinion there states, *inter alia:*

> "These statutes [*i.e.*, 25 U.S.C. §§ 261-266], by their terms or by judicial construction, are limited in their application to Indian reservations. (Citations omitted) Congress has not exercised its power to regulate trade with the Indians insofar as trade off the reservation is concerned except in the traffic in liquor."

The Interior Department opinion continues, however, 57 I.D. at 126:

> "In the review of the relationship between the federal government and the state government on an Indian reservation, in *Surplus Trading Co. v. Cook*, 281 U.S. 647 [(1930)], the Supreme Court stated that the jurisdiction of the state over the reservation is full and complete save as to the Indians and their property."

Thereafter, the opinion specifically concludes that where traders are not *located*[7] on Indian reservations they were responsible for the state taxes and subject to licensure whether or not they were Indians and "... whether or not they deal with Indians." *See*, 57 I.D. at 126.

Based upon the foregoing, it is the State's position that the rationale of *Warren* is inapplicable to the case *sub judice* for the simple reason that the area that has been preempted is that of engaging in the business of Indian trading on an Indian reservation. There is no discernible intent in either the *Warren* decision or the relevant congressional enactments evincing an objective to draw within the scope of the preempted area any and all mercantile

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[7] The term "located" embodies a concept involving more than mere transitory physical presence in a particular place. *Cf. Federal Power Commission v. Texaco, Inc.* 377 U.S. 33, 37-39 (1964).

trade activities ocurring between Indians and non-Indians. Quite simply, CMC is not a licensed Indian trader not only because it lacks the required federal license, but because it does not fit the definition of a licensed Indian trader.

A.

CMC is Neither a Trader nor an Itinerant Peddler Within the Federal Provisions Herein

With respect to the observations of CMC and the United States that the lower court decision appeared to be based upon the fact that the tax was properly imposed because CMC was not in compliance with federal law, such a circumstance, while perhaps not dispositive, is nonetheless germane vis à vis the question of whether or not CMC would have been entitled to hold such a license in the first place. As a practical matter, it makes no sense to characterize CMC as either being engaged in the business of Indian trading on an Indian reservation or as being properly termed an "itinerant peddler" within the meaning of 25 C.F.R. Part 251, specifically, 25 C.F.R. § 251.9(b).

On this latter point, CMC resembles an "itinerant peddler" to an even less degree than does it resemble an Indian trader engaged in the business of Indian trading with Indians on an Indian reservation. This Court has specifically held that a peddler is one who travels from place to place, selling goods carried about with him, and *not* those who solicit orders for the future delivery of goods to be shipped in

the course of commerce. *Crenshaw v. Arkansas*, 227 U.S. 389 (1913).[8]

Thus, the reliance by both CMC and the United States upon *United States ex rel. Hornell v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978), is misplaced. There, a *qui tam* action was brought against a non-Indian automobile dealership for the unlawful introduction into the Navajo Indian Reservation of an automobile purchased by two Navajo Indians. The action was brought under 25 U.S.C. § 264, which statute states in unequivocal terms, that "... any *person* ..." (emphasis added) who introduces goods into or attempts to trade within an Indian reservation without the mandatory federal license shall forfeit all merchandise offered for sale and be liable to a $500 penalty.

Insofar as the *Hornell* decision is concerned, the term "any person" means just that: it applies to bona fide itinerant peddlers as well as to automobile salesmen and other people who do not fit the defined class of peddlers. In other words, insofar as 25 U.S.C. § 264 is concerned, while all bona fide itinerant peddlers fall within the class "any person," not all persons fall within the class "itinerant peddlers." The obvious purpose of the statute is to ensure that any and all trade within the Indian reservation shall be conducted in strict compliance with the federal requirements. There is no exception set forth in the statute and none should be implied in view of the penal nature of the

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[8] The *Crenshaw* case appears to be the most recent decision of this Court square on point. *See, also, Emert v. Missouri*, 156 U.S. 296 (1895). There are, however, numerous decisions from lower courts articulating the same rule. *See, e.g., Campbell Baking Co. v. City of Harrisonville, Mo.*, 50 F.2d 670, 675 (8th Cir. 1931), *ovrl'd on other grounds* 64 F.2d 755 (8th Cir. 1933); *People v. Smith*, 312 N.Y.S.2d 392, 63 Misc.2d 418 (1970); *State v. Jobin*, 58 Ariz. 141, 118 P.2d 97 (1941), *rev'd on other grounds*, 319 U.S. 103 (1943). *See*, Record on Appeal, Second Agreed Statement of Facts, Item 15, pp. 15, 15c, 15d.

legislation. Thus, the reliance placed upon *Hornell* by both CMC (Appellant's Brief, p. 10) and the United States (United States Amicus Curiae Brief, p. 5) is conceptually obscure.

B.

General Principles of Federal Preemption do not Forbid or Displace the State Tax

At this juncture, a brief examination of basic doctrines of federal preemption may be beneficial. As previously indicated, the source of the federal preemption power is Article 6, Section 2 of the Constitution, the Supremacy Clause. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-152 (1963). Under this section, federal enactments constitute the supreme law of the land. However, where state laws exist beyond the areas affected by federal law, the Supremacy Clause does not require their preemption or displacement.

In this regard, this Court has held that the federal judiciary must be vigilant to insure that the application of state law poses no significant threat to any identifiable federal policy or interest, *Burks v. Lasker*, ___ U.S. ___, 99 S.Ct. 1831, 1838 (1979), quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Furthermore, before a preemption of state law can occur, the actual or asserted clash between the two should not be trivial or insubstantial, but must be of substance. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 423 n.20 (1973). Only when the state and federal laws are absolutely and totally contradictory and repugnant must the state laws fall. *Goldstein v. California*, 412 U.S. 546, 553 (1973).

Insofar as the preemption doctrine was applied by this Court in *Warren*, the decision in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) formed the basis for the application of the principle. In that case, notions of federal preemption were premised, in general, upon three basic concepts, *viz.*, pervasiveness of federal regulation, domination of federal interest and unhampered operation of federal laws. While these factors might, at first glance, appear to constitute a comprehensive "test" for federal preemption through "occupation of field," the three criteria appear to have been applied in such a fashion infrequently.[9]

In view of the foregoing, therefore, a brief examination of the preemption cases decided after *Rice*, it is submitted, will reveal a modification of the somewhat stringent criteria set forth therein vis à vis the continued application of state laws. For example, this Court's recent decision in *DeCanas* articulates a rule that, while the Supremacy Clause requires the invalidation of state laws which directly burden or conflict with federal laws or treaties, state laws which may conflict with federal objectives, absent any repealing or exclusivity provisions, need not be completely displaced but need be preempted only insofar as necessary to protect the achievement of the aims of the federal law, since "... the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding the [state scheme] completely ousted'" *See, DeCanas, supra*, 424 U.S. at 357-358, n.5.[10]

Moreover, the opinion quoted with approval (424 U.S. at 360, n.8) from the dissenting opinion of Justice Stone in *Hines v. Davidowitz*, 312 U.S. 52, 78-79 (1941), wherein he stated that, while every act of Congress occupies some field, the boundaries of the field must be first ascertained before it can be determined whether a state law must be preempted. To discover these boundaries, Justice Stone observed (312 U.S. at 79), one must "... look to the federal statute itself, read in the light of its constitutional setting and its legislative history."

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[9] *See, e.g., Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

[10] This objective of reconciling conflicts rather than preempting altogether represents a modification of the ruling in Rice.

Accordingly, the decision in *DeCanas* appears to have ameliorated the stringent statement contained in *Rice, supra*, 331 U.S. at 230, that the "... scheme of federal legislation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement." If, in fact this is the case, then a more detailed examination of the basis of the holding in *Warren* appears to be indicated.

An examination of the briefs of both CMC and the United States as amicus curiae will immediately reveal that the basis for the contention that the transaction privilege tax in question has been preempted is that portion of the decision in *Warren* based upon the holding in *Rice*. As will be hereinafter demonstrated, however, it is the position of the Appellee that not only is the rule of *Rice* inapplicable upon the facts of the present case, the rationale of *Warren*, including its analysis of the applicability of the Buck Act (4 U.S.C. §§ 105-110), does not prevent the application of the taxes herein.

C.

The McClanahan Decision Necessitates a Re-examination of Footnote 18 in Warren.

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973), held that Arizona could not impose the direct legal incidence of its personal income tax upon a reservation Indian. Although various bases were cited by the Court in support of this result, insofar as the present dispute is concerned, one of them is particularly germane. In support of the ruling, this Court stated, 411 U.S. at 176:

> "... Congress' intent to maintain the tax-exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C. § 105 *et seq., which provides comprehensive federal guidance for state taxation of those living within federal areas.*" (Emphasis added)

Although the opinion thereafter qualifies that statement by observing that the Buck Act (*i.e.*, 4 U.S.C. §§ 105-110) cannot be read as an affirmative grant of tax-exempt status to reservation Indians, which observation addresses itself to the substantive question involved therein (that is, whether or not the direct legal obligation for a state tax may be imposed upon a reservation Indian[11]), the statement is highly material to the question of the continued vitality of the conclusion in footnote 18 in *Warren. See, Warren, supra*, 380 U.S. at 691, n.18.[12]

Without regard to the substantive application of the Buck Act to Rosalind McClanahan's situation,[13] the discussion of the Buck Act in the *McClanahan* case implicitly acknowledges the applicability of the legislation to Indian reservations. No other rational interpretation or meaningful conclusion may be accorded to the Court's language, 411 U.S. at 176, "... the Buck Act ... provides comprehensive federal guidance for state taxation of those living within *federal areas.*" (Emphasis added)

Accordingly, and in conformity with this Court's ruling in *DeCanas, supra*, 424 U.S. at 360, n.8, an examination of the Buck Act, read in the light of its constitutional setting and its legislative history, is necessary.

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[11] *See, e.g., Bryan v. Itasca County*, 426 U.S. 373 (1976).

[12] In footnote 18 in *Warren*, this Court relied upon various sources to arrive at the conclusion that the Buck Act, 4 U.S.C. §§ 105-110, was not intended by Congress to apply to Indian reservations. In addition, the final sentence of the footnote indicated that, even assuming that the Arizona transaction privilege tax was "... of a kind to which the Buck Act applies, nothing whatever in that Act suggests to us that Congress meant to give states new power to tax federally licensed traders. *See* 58 I.D. 562."

[13] 4 U.S.C. § 109 exempts Indians "... not otherwise taxed ..." from the direct levy of state sales, use and income taxes otherwise applicable under 4 U.S.C. §§ 105 and 106 within "federal areas" as defined in 4 U.S.C. § 110(e). *See, Appendix, infra.*

(1)

The History of the Buck Act Supports the Application of this Tax.

In *McClanahan,* the Court's analysis focused upon the application of one portion of the Buck Act: 4 U.S.C. § 109. That statute grants reservation Indians an exemption from the direct legal imposition of state sales, use or income taxes otherwise applicable within federal areas under 4 U.S.C. §§ 105 or 106. A disparity, however, arises upon an examination of footnote 18 in *Warren.* It was there held that, since Indian reservations were not "federal areas" within the meaning of 4 U.S.C. § 110(e), 4 U.S.C. §§ 105 and 106 did not apply to Indian reservations. The inconsistency thus arises: if an Indian reservation *is* a "federal area" for purposes of 4 U.S.C. § 109, what explanation exists for concluding that an Indian reservation is *not* a "federal area" for purposes of 4 U.S.C. §§ 105 and 106? Indeed, the decision in *McClanahan*—while on the facts of that case independently justifiable—acknowledges that, for purposes of 4 U.S.C. § 109, the Buck Act is germane to the inquiry, if at all, *only* if an Indian reservation is a "federal area."

At this juncture, the legislative history of the Buck Act becomes highly relevant. The first version of what later came to be the Buck Act was introduced in 1939 by Representative Frank H. Buck of California. He sought to provide for the application of state sales and use taxes in those areas where the federal government "... may have jurisdiction." *See,* H.R. 6687, 76th Cong., 1st Sess., 84 Cong.Rec. 6737 (1939). The legislation failed to pass in 1939, but it was reintroduced the following year, at which time the Senate Finance Committee made various amendments to the bill to add state income taxes, to exempt sales by instrumentalities of the United States, and to exempt the imposition of state taxes, whether sales, use, or income, upon reservation Indians. *See,* S.Rep.No. 1625, 76th Cong., 3rd Sess. (1940); Hearing on H.R. 6687 before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3rd Sess., (April 23, 1940) (hereinafter "Hearing"). H.R. 6687 was eventually passed by Congress and, after reenactment and codification in 1947, the bill became the present 4 U.S.C. §§ 105-110, popularly known as the "Buck Act".

Congressman Buck had prepared for the April 23, 1940 hearing a report setting forth the purpose of the Act, Hearing, *supra,* pp. 3-4:

> "Recent decisions of the Supreme Court of the United States in the cases of ... [cases omitted], [14] while opening the way for the application of certain nondiscriminatory State taxes on Federal areas, except insofar as those taxes may constitute a burden upon the United States, have not clearly indicated the exact extent of state authority in this respect.
>
> "Divergent views being expressed by taxpayers and taxing authorities makes [*sic*] it evident that prolonged and expensive litigation will be required to clarify the law on the subject if the limits of State authority with respect to the various types of Federal areas are to be established through judicial decisions. This litigation and the period of uncertainity which will necessary [*sic*] exist pending final decisions by the United States Supreme Court may, however, be avoided through Congressional action, a precedent for which is to be found in an Act of Congress approved June 16, 1936, amending Section 10 of the Hayden-Cartwright Act

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[14] The cases to which Congressman Buck referred were *James v. Dravo Contracting Company,* 302 U.S. 134 (1937), *Silas Mason Company v. Tax Commission,* 302 U.S. 186 (1937), and *Atkinson v. State Tax Commission,* 303 U.S. 20 (1938).

(49 Stat. 1521; 23 U.S.C.A., § 55a) relating to State motor vehicle fuel taxes.[15]

. . .

"A minor problem presented with respect to the application of State sales taxes on Federal areas involves the responsibility for such taxes of post exchanges, ship-service stores, commissaries, *licensed traders*, and other similar agencies operating on Federal areas." (Emphasis added).

The question of whether or not the grant of taxing authority under consideration should apply to Indian reservations was thus specifically considered. In fact, Representative Buck stated (Hearing, p.2) that, in his personal experience, a problem existed with respect to taxes on sales

". . . at commissaries, *licensed traders*, [*sic*] and other similar agencies. We had some bad situations with regard to these *licensed traders*. There are *licensed traders* on certain reservations, for instance, at Palm Springs, Calif., you [*sic*] have your reservation line right down the street, and on one side of the street you have merchants who are paying sales taxes, and on the other side you have *licensed traders* who are not paying any sales tax on identically the same types of goods." (Emphasis added)[16]

[15] A related discussion of the legislative histories and underlying congressional intent of both the Hayden-Cartwright Act (49 Stat. 1521; 4 U.S.C. § 104) and the Buck Act (54 Stat. 1059; 4 U.S.C. §§ 105-110) is contained in the Brief for Respondents in *White Mountain Apache Tribe v. Bracker*, USSC Doc. No. 78-1177, October Term, 1979, pp. 19-30 (argued in tandem with the case herein). *See, in particular*, the discussion (Brief of Respondents, pp. 22-23) of Interior Department Opinion 57 I.D. 129, 138-140, holding that the use of the term "licensed traders" in § 10 of the Hayden-Cartwright Act evinced a congressional intent to include Indian reservations as "United States military or other reserations" within the meaning of the Act. *See also, Appendix, infra.*

However, at the April 23, 1940 hearing, the United States Department of the Interior urged that Indian *reservations* should be excluded from state taxes which would otherwise be applicable under the Buck Act. *See*, letter from E. K. Burlew, Acting Secretary of the Interior, March 13, 1940, Hearing, *supra*, pp. 39-40. The letter outlines the concerns of the Interior Department to preserve the exemption of reservation Indians from the direct levy of state taxes, a goal believed by the Interior Department to be best served through the limitation of the Buck Act by the so-called "LaFollette Amendment". That amendment provided in pertinent part that " . . . this Act [*i.e.*, the Buck Act] shall not affect existing law relating to taxation on Indian reservations."

The final version of 4 U.S.C. § 109, however, rejected the recommendation of the Department of the Interior and instead adopted the position advocated by Representative John Dempsey of New Mexico. *See*, Hearing, *supra*, pp. 18-20. Representative Dempsey argued that the Buck Act should exempt *Indians*, but not Indian *reservations*, his opinion being that:

[16] With regard to Congressman Buck's statement, *see, Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F.Supp. 279, 281 (C.D.Cal. 1969), *affirmed*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972), *rehearing denied*, 405 U.S. 1033 (1972), *motion for leave to file second petition for rehearing denied*, 409 U.S. 901 (1972), establishing that the Agua Caliente Indian Reservation exists on a checkerboard pattern in the area of Palm Springs, California. This Court may take judicial notice of the geographic fact that the only federal reservation in the vicinity of Palm Springs, California is the Agua Caliente Indian Reservation.

> " . . . [W]e have no desire to tax the Indians. They are exempt from taxation in our state, but we do not believe that because a man establishes a store on Indian lands competing with the store outside, the store inside should be exempt from all taxation, that a store outside should pay."

From the foregoing legislative history, it is apparent that congressional concern was *not* over whether the Buck Act should or should not apply to Indian reservations. Rather, the concern focused on whether the Buck Act should authorize the levying of the direct legal incidence of state sales, use or income taxes upon reservation Indians. The rejection of the LaFollette Amendment in favor of the position advocated by Representative Dempsey conclusively demonstrates that Congress considered Indian reservations to be "federal areas" within the purview of what eventually became 4 U.S.C. § 110(e) and that "licensed traders" *were* intended to be covered by the legislation, at least in those states where the *legal* incidence of the tax in question—sales, use or income—was upon the trader as opposed to any Indian customer of the trader.[17]

Thus, while Congress continued to support an objective of shielding reservations Indians from the direct legal incidence of state taxes, it specifically intended to remove any tax shield for *non*-Indians—including licensed traders—if they were located within a particular type of federal area, *viz.*, an Indian reservation.

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[17] 4 U.S.C. § 110(e) provides:

> "As used in §§ 105-109 of this title—
>
> . . .
>
> (e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State."

At this point, it might well be suggested by CMC or the United States that the foregoing discussion by the Appellee herein constitutes little more than a fanciful embellishment upon the legislative history of the Buck Act, a strained interpretation pursued only in an attempt to avoid the purportedly controlling effect of the *Warren* decision, particularly footnote 18 thereof. Such a suggestion would be unsupportable.

The foregoing tracing of the legislative history of the Buck Act, supporting the conclusion that Congress intended that an Indian reservation be a "federal area" within the meaning of 4 U.S.C. §§ 105-110, did *not* originate with the Appellee herein: it orginated in Rosalind McClanahan's Response to the State's Motion to Dismiss her complaint and action in the Superior Court action in Arizona.[18] The Arizona Court of Appeals' decision in the case (*i.e., McClanahan v. Arizona State Tax Commission*, 114 Ariz. 452, 484 P.2d 221 (1971)), neither cited nor relied upon the Buck Act in reaching its conclusion that the Arizona income tax did apply.

However, on the appeal of the State court decision to this Court, not fewer than eight separate briefs and/or memoranda were filed by the Appellant parties and various supporting amici curiae urging the uniform position that the Buck Act was either specifically, implicitly or impliedly

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[18] *See* Abstract of Record, *Rosalind McClanahan v. State Tax Commission of Arizona*, Arizona Court of Appeals, Division 1, Cause No. 1 CA-CIV 1316, pp. 18-19.

applicable to Indian reservations.[19] The foregoing facts, the Appellee would respectfully submit, clearly demonstrate that, insofar as the Buck Act is concerned, an Indian reservation is a "federal area" within the meaning of 4 U.S.C. § 110(e). The Appellee agrees with the abstract contention that there is no specific congressional intent expressed in the Buck Act to permit the direct application of state taxes to reservation Indians. There is, however, a clear expression of intent by Congress to extend the Buck Act to a particular species of federal area, *viz.*, Indian reservations, and a particular species of merchant residing thereon, licensed Indian traders in situations where the legal incidence of the state tax—as opposed to its contractually "shifted" economic burden—is confined by state law to a non-Indian.

The Appellee would respectfully submit that unless CMC, and/or the United States as amicus curiae can fashion a suitable explanation for the apparent inconsistency between the *McClanahan* decision and footnote 18 in *Warren*, the conclusion is strongly suggested that the

[19] These briefs were filed in the *McClanahan* case, USSC Doc. No. 71-834, October Term, 1971: (1) Appellant's Supplemental Brief in Opposition to Appellee's Motion to Dismiss or Affirm; (2) Brief for Appellant; (3) Reply Brief for Appellant; (4) Memorandum for the United States as Amicus Curiae; (5) Brief for the United States as Amicus Curiae; (6) Brief of the Navajo Tribe of Indians, as Amicus Curiae, in Support of Jurisdictional Statement; (7) Brief of Montana Inter-Tribal Policy Board as Amicus Curiae; (8) Brief for Amicus Curiae, National Congress of American Indians in Support of Appellant. In this regard, compare the similar although not identical position adopted by the United States as amicus curiae in *Kahn v. Arizona State Tax Commission*, 16 Ariz. App. 17, 490 P.2d 846 (1971), *appeal dismissed* (want of substantial federal question), 411 U.S. 941 (1973) (Brennan, Douglas, J.J., dissenting with opinion, 411 U.S. at 941-944), Memorandum for United States as Amicus Curiae, USSC Doc. No. 71-1263, October Term, 1972. p. 5.

The position of the Indian in *McClanahan* is perhaps best summarized in her Reply Brief, item (3), *supra*, p. 17 thereof:

> "... [T]he Buck Act did intend to deal with taxing jurisdiction on Indian reservations, and it specifically exempted Indians from state income tax."

McClanahan decision, rendered some eight years following *Warren*, has modified the rationale supporting the conclusions reached in footnote 18 of *Warren* and, accordingly, necessitates a re-examination of the question.

(2)

The Authorities in Footnote 18 of *WARREN* Were Premised Upon Mistakes of Fact and Law.

An explanation for the disparity between the rationale of *McClanahan* and footnote 18 in *Warren* may be found in a closer examination of the briefs and records in the two cases. To begin with, the State of Arizona argued in *Warren* that the legislative history of the Buck Act evinced a congressional objective to apply it to Indian reservations.[20] The taxpayer, Warren Trading Post Co., replied that, based upon the New Mexico Supreme Court decision in *Your Food Stores Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961),[21] Indian reservations were not "federal areas" and thus, the Buck Act was inapplicable.

However, an examination of the briefs and decision in *Your Food Stores*[22] will reveal that the dispositive issue was whether or not the Village of Espanola could annex a portion of an Indian reservation. If the annexation were valid, so conceded Your Food Stores, Inc., it would be subject to a Village of Espanola municipal sales tax; but if the village's annexation were invalid, no jurisdiction to impose the tax would exist.[23]

[20] *See*, Brief for the Appellees, *Warren*, USSC Doc. No. 115, October Term, 1964, pp. 16-19.

[21] *Cert. denied*, 268 U.S. 915 (1961).

[22] The briefs are on file at the University of New Mexico (Law School) Records Center, Box 102, Locator No. K-055.

[23] Appellant Your Food Store's Opening Brief, N.M.Sup.Ct. Doc. No. 6716, p. 8.

However, after quoting the tax impositional language of 4 U.S.C. § 105(a) and the definition of "federal area" in 4 U.S.C. § 110(e),[24] the New Mexico opinion misparaphrased the definition and arrived at the conclusion that, under 4 U.S.C. § 110(e), the Indian reservation did not constitute lands or premises held or acquired by "... *or* ..." (4 U.S.C. § 110(e), emphasis added) for the use of the United States.[25]

In *Warren*, however, the taxpayer recognized the disjunctive nature of the definition of "federal area" in 4 U.S.C. § 110(e).[26] In questioning whether Indian reservations were "... lands ... held or acquired by ... the United States ..." within 4 U.S.C. § 110(e), Warren Trading Post Company acknowledged that, while in some contexts, Indian reservations are considered to be held by the United States in trust for the Indians, in other contexts the lands may be considered as being held or owned not by the United States, but by the tribes themselves, citing in support of that assertion a 162-page segment of *Federal Indian Law*, United States Department of Interior (1958), pp. 583-745.[27]

In keeping with generalized notions of the primacy of Indian self-government vis à vis *internal* tribal relations, the discussion in that segment recognizes quasi-ownership interests of the Indians in the lands they occupy. *See, e.g., Federal Indian Law* (1958), pp. 583-584; 591-592. However, where external influences (*e.g.*, state laws) touch the lands, the discussion is dramatically shifted toward treatment of the lands as being owned not by the Indians, but by the United States.

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[24] *See*, 361 P.2d at 955.

[25] Id. at 955-956. The Santa Clara Pueblo lands were originally acquired by the Indians under a grant from a prior sovereignty, the King of Spain. *See*, 361 P.2d at 951-952.

[26] *See*, Appellant's Reply Brief, *Warren, supra*, USSC Doc. No. 115, October Term, 1964, p. 2.

[27] Id. at 2-3, n.2.

For example, the discussion states:

> "Land acquired by the United States in trust for an Indian tribe has been held to be immune from State zoning regulations, which, in terms, do not apply to lands 'belonging to and occupied by the United States'." [28]

Furthermore, with respect to reservations such as the Navajo Indian Reservation, the United States Attorney General, relying upon this Court's decisions in *Spalding v. Chandler*, 160 U.S. 394 (1896) and *In re Wilson*, 140 U.S. 575 (1891), held in a "... carefully documented opinion ..." that as to such reservations, the Indians enjoyed a right of occupancy but

> "... the United States has the title in fee ...
>
> "... [T]he Indian right of occupancy is as sacred as the fee title of the sovereign." [29]

Accordingly, the question of whether or not Indian reservations are federal areas for purposes of the Buck Act and 4 U.S.C. § 110(e) was not as easily solved as the Warren Trading Post Company suggested. On the contrary, if any general conclusion is to be drawn from the foregoing facts, it is this: *Your Food Stores* is not dispositive of the question.

With respect to that portion of footnote 18 in *Warren* that refers to Interior Department opinion 58 I.D. 562, it is the State of Arizona's position that Solicitor Harper assumed that the *uniform* rule with respect to state "sales" taxes was that while they might be initially levied upon the vendor, they were required by state law to be collected from the vendee, thereby making the tax a vendee liability.

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[28] *Federal Indian Law* (1958), p. 588, citing memo Sol. I.D. October 5, 1936, 58 I.D. 52. *Compare* with the language of 4 U.S.C. § 110(e).

[29] Id. at 614-615.

That he would erroneously so conclude in the factual context of 58 I.D. 562 is understandable: the question presented therein was whether or not the Superintendent of the Taholah Indian Agency in Washington was properly inserting the words "State sales tax exempt" into purchase orders for purchases for Indians paid for from individual Indians' restricted accounts.[30]

After prefacing his remarks by reference to 57 I.D. 124,[31] he opined that the conclusions of 57 I.D. 124 — with the exception of part 2(b) thereof[32] — remained valid and that on-reservation sales to Indians under the jurisdiction of the Taholah Indian Agency were exempt from the state sales tax.

The fact of the matter is that, in 1943 (as well as today[33]), the Washington sales tax was a true "sales" tax having as its taxable event the actual title/possession transfer (rather than, as in Arizona, the exercise of the privilege of engaging in business) and having its legal incidence upon the vendee rather than the vendor.[34]

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[30] 58 I.D. at 562.

[31] 57 I.D. 124 held that neither the Arizona transaction privilege tax nor the Arizona luxury tax could be applied to sales made by federally-licensed Indian traders to Indians on Indian reservations.

[32] Part 2(b) of 57 I.D. 124 was specifically overruled in 58 I.D. 562.

[33] *See*, Rev. Code Wash. §§ 82.08.020, 82.08.050 (1979); *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339, 1371 (E.D.Wash. 1978), *appeal pending* U.S. Supreme Court, October Term, 1978, USSC Doc. No. 78-630.

[34] *See*, Rem. Rev. Stat. § 8370-21 (1941); *Morrow v. Henneford*, 182 Wash. 625, 47 P.2d 1016 (1935); *Kaeser v. City of Everett*, 47 Wash. 2d 666, 289 P.2d 343 (1955).

Moreover, in 57 I.D. 124, First Assistant Solicitor Kirgis viewed both the Arizona transaction privilege tax act,[35] and the Arizona luxury tax act,[36] there under examination as creating vendee-liability taxes: his observation (57 I.D. at 125) that "... both acts contemplate that the amount of the tax shall be added to the price paid by the consumer ..." was wrong. There was no requirement whatsoever under either tax act as they existed on May 8, 1940 that either tax be collected from or "shifted" to the customer vendee by the vendor.[37]

The additional observation (57 I.D. at 124) that, as to the transaction privilege tax, provision was made by the law for the use of tokens by purchasers to reimburse the dealers for the tax applicable to any sale, is similarly erroneous if intended to show that such provision created a vendee-liability situation. This error is understandable in view of the fact that the Supreme Court of Arizona had not yet ruled in *State Tax Commission v. Quebedeaux Chevrolet*, 71 Ariz. 280, 226 P.2d 549 (1951), wherein the same contention (*i.e.*, that the token provision effected a basic change in the vendor-liability nature of the tax) was rejected. The true purpose of the token provision was to facilitate the making of "change" between the vendor and the vendee for the contractually assumed "cost" of the tax upon transactions involving small or fractional dollar sales. Since the tokens had a "face value" of one mill, they could be used to make "change" where such amounted to fractions of the lowest value coin at that time, the penny. In 1940, people had a much keener interest in the value of a penny. In any

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[35] *See*, Arizona Laws 1935, Ch. 77 (now Ariz. Rev. Stats. §§ 42-1301 *et seq.*).

[36] *See*, Arizona Laws 1935, Ch. 78 (now Ariz. Rev. Stats. §§ 42-1201 *et seq.*).

[37] By Ariz. Laws, 1943, Ch. 84, § 1, the luxury tax act was amended to provide for the first time for mandatory addition to the sales price and collection of the luxury tax from the customer as to purchases of vinous, malt and spirituous liquors. No such amendment has ever been made to the Arizona transaction privilege tax.

event, the law was repealed in 1954[38] and any argument that might otherwise have been made, despite *Quebedeaux*, that the tax was a vendee-liability tax, becomes even more untenable.

With regard to that portion of the opinion in 58 I.D. 562 that the legality of state taxes on sales to Indians was to be determined "... not by but independently of ..." the Buck Act (58 I.D. at 563), the State of Arizona would respectfully submit that this makes sense only if there is a valid underlying understanding of the legislative history of the Buck Act and a correct analysis of the nature and provisions of the tax laws being scrutinized. To the extent that these criteria are not met, the continuing validity of the conclusion is drawn into question.

Thus, and by way of summary, the State of Arizona is fully aware of the fact that this Court—rather than counsel for parties and/or amici curiae appearing before the Court, legislators or solicitors and assistant solicitors for the Interior Department—is the final arbiter of the question as to the applicability or inapplicability of the Buck Act to Indian reservations. The State of Arizona does not suggest otherwise.

However, the objective of the foregoing discussion is to present for examination what appear to be several inconsistencies and/or erroneous assumptions of fact and law in the cases, opinions and legislative histories of the statutes surrounding both the Hayden-Cartwright Act and the Buck Act. This is done not for the purpose of contending that the examination will produce a final, dispositive determination as to the applicability of the Buck Act to Indian reservations.

Rather, it is undertaken for the purpose of suggesting that, due to what appear to be a variety of erroneous factual and legal assumptions in *Your Food Stores* in the two Interior Department Decisions cited at footnotes 15 and 16

[38] *See*, Ariz. Laws 1954, Ch. 136, § 14.

in *Warren* (57 I.D. 124 and 58 I.D. 562) and in view of the legislative history of the Buck Act, contrary to the finding in footnote 18 in *Warren*, it may well be that Congress did, after all, intend for the Buck Act to apply to Indian reservations, *not* as a general matter, but rather on a limited basis, *viz.*:

> 1. Where the legal incidence of a state tax otherwise permissible under 4 U.S.C. §§ 105 or 106 either initially falls by mandate of state law upon an Indian or is required by state law to be "shifted" from a non-Indian to an Indian, it is impermissible;
>
> 2. Where the legal incidence of a state tax otherwise permissible under 4 U.S.C. §§ 105 or 106 falls and remains by mandate of state law upon a non-Indian, it is permissible.

In this way, the State would submit, the legislative intent underlying the Buck Act, and the Hayden-Cartwright Act, as well as the rationale of the decisions in *McClanahan*, *Moe*, and *Bryan*, will be best served.

III
THERE IS NO INFRINGEMENT OF ANY RIGHT OF INDIAN SELF-GOVERNMENT HEREIN.

Although neither CMC nor the United States as amicus curiae specifically urge the point, it is the Appellee's position that, even if the specific argument were so made, the Arizona transaction privilege tax as imposed upon CMC results in no infringement of any right of tribal self-government under the principles espoused in *Williams v. Lee*, 358 U.S. 217 (1959). While this particular issue is discussed in much greater detail in the case argued in tandem with the case *sub judice*,[39] suffice it to say for purposes of the present dispute that numerous decisions of this Court as well as inferior federal and state courts establish that, upon facts such as these, the imposition of a state tax upon the non-Indian who has dealings with reservation Indians

[39] *I.e.*, *White Mountain Apache Tribe v. Bracker*, USSC Doc. No. 78-1177, October Term, 1979, pp. 13-18.

does not, *per se*, result in an infringement of any right of tribal self-government.[40]

IV
CONSTITUTIONAL PREEMPTION AS ADVOCATED BY THE UNITED STATES HEREIN IS INAPPROPRIATE.

Although the taxpayer, CMC, makes no mention of the principle, the United States as amicus curiae has raised a brand new issue insofar as the present dispute is concerned. That issue involves the assertion that, without regard to the federal Indian traders statutes or the regulations implementing such statutes, Article 1, Sec. 8, Clause 3, the Commerce Clause, of its own force and effect, preempts the application of the state laws here in question. The basis of the argument is apparently that, because of the purported overriding concern of the United States in matters of Indian affairs, the United States Constitution, without the aid of congressional action, may operate to preempt the transaction privilege tax as applied to Central Machinery Company's business activities.

The United States contends in its Amicus Curiae Brief, p. 12, that:

[40] *See, e.g.*, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481-483 (1976); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1255-1256 (9th Cir. 1976), *cert. denied* 430 U.S. 983 (1977); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186-1187 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972), *rehearing denied* 405 U.S. 1033 (1972), *motion for leave to file second petition for rehearing denied*, 409 U.S. 901 (1972); *Kahn v. Arizona State Tax Commission*, 16 Ariz.App. 17, 18-21, 490 P.2d 846, 847-850 (1971), *appeal dismissed* (want of substantial federal question) 411 U.S. 941 (1973) (Brennan, Douglas, JJ., dissenting with opinion, 411 U.S. at 941-944); *Makah Indian Tribe v. Tax Commission*, 72 Wash.2d 613, 615-617, 434 P.2d 580 581-582 (1967), *appeal dismissed* (want of substantial federal question) 393 U.S. 8 (1968); *Department of Revenue v. Hane Construction Company, Inc.*, 115 Ariz. 243, 564 P.2d 932 (Ct. App. 1977).

> "... the specific history of the Indian Commerce Clause itself confirms its purpose to nationalize white-Indian relations and *wholly to exclude state authority to regulate that intercourse.*" (Emphasis added)

This contention, quite simply, is enigmatic: if such, indeed, were the law, then this Court would be forced to overrule its decision in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). If the United States' argument were correct, the Montana "pre-collection" requirement (*see, Moe*, 425 U.S. at 482) would have been absolutely impermissible. The mere fact that the Indian, Joseph Wheeler, was a *vendor* of the cigarettes there in question as opposed to a *vendee* of the same, does not alter the fact that, under the United States' "constitutional preemption" argument, this Court could not have upheld the imposition of the Montana taxes with respect to Mr. Wheeler's sales to non-Indians. The fact of the matter is that precisely the opposite ruling was handed down by this Court in its unanimous opinion.

It therefore is the Appellee's position that, assuming, *arguendo*, that the "constitutional preemption" argument is properly before this Court, (*see*, n.4, *supra*), the *Moe* decision establishes, by its own force and without reference to further cases, the error of the United States' argument.

CONCLUSION

For all of the foregoing reasons, the judgment of the Arizona Supreme Court herein should be affirmed.

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APPENDIX

4 U.S.C. § 104. Tax on motor fuel sold on military or other reservation[;] reports to state taxing authority.

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.

4 U.S.C. § 105. State, and so forth, taxation affecting federal areas; sales or use tax

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any

Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

4 U.S.C. § 106. Same; income tax

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

4 U.S.C. § 109. Same; exception of Indians

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

4 U.S.C. § 110. Same; definitions

As used in sections 105-109 of this title—

. . .

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.